

HUMAN SERVICES BOARD

INTRODUCTION

DISCUSSION

The pertinent statutes, at 33 V.S.A. § 4912, include the following:

(2) An "abused or neglected child" means. . .a child who is sexually abused. . .

. . .

(4) "Risk of harm" means a significant danger that a child will suffer serious harm other than by accidental means, which harm would likely cause physical injury, neglect, emotional maltreatment or sexual abuse.

. . .

(8) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. . .

There is no dispute in this matter that in 1996 the Family Court, in a CHINS proceeding, concluded:

(Daughter) was sexually abused by her father. Both (daughter) and (sister) were subjected to emotional abuse by their parents. Because (mother) repeatedly supported (father's) testimony at hearing over (brother) and (daughter), the Court concludes (mother) cannot provide care and supervision or protection of (daughter) and (sister).

The Court's decision included detailed findings of oral sex and attempted sexual intercourse between the petitioner and his daughter, and the refusal of his wife to intervene in her daughter's behalf after she and her brother reported it to her. There is no dispute that as a result of this order the petitioners' daughter was removed from the petitioners' home, placed in DCF (then SRS) custody, and raised for the remainder of her childhood in foster homes.

Prior to the Family Court's order, the Department had substantiated the petitioners for sexual abuse and risk of sexual abuse. The petitioners did not appeal this decision until 2009. The petitioners represent that they are appealing because the substantiation prevents them from seeing their grandchild (their daughter's child) and that their daughter now recants her 1996 testimony.

On November 6, 2009 the Department furnished the petitioners and the Board with the records of the 1996 Family Court proceedings and moved for summary judgment on this basis. A telephone status conference was held on November 9, 2009. The matter was continued to allow the petitioners to determine whether their daughter would testify in the matter. At a telephone status conference held on December 7, 2009 the petitioners represented that their daughter had refused to testify "for either side". The petitioners declined the hearing officer's offer of a subpoena.

The Board has held, and the Vermont Supreme Court has affirmed, that the doctrine of collateral estoppel applies in cases in which there has been a prior adjudication on the issue of child abuse or neglect. *In re P.J.*, 2009 Vt. 5 (No. 2008-057 Jan. 26, 2009), 969 A.2d 133 (2009); (see also *Croteau v. Malloy*, 135 Vt. 64 [1977]). Inasmuch as there is

no dispute that one of the petitioners was found by the family court to have sexually abused his daughter, and the other to have placed her at risk of sexual abuse, the petitioners cannot now relitigate the issue of whether the report of sexual abuse was "substantiated".

In its decision not to expunge the report from its registry the Department noted that the petitioners had failed to admit the prior sexual abuse, and were insisting that it never happened. The petitioners want the matter expunged because they claim their daughter would now recant her 1996 testimony. However, the petitioner's concede that their daughter is not willing to testify in their behalf in this regard.

The Board's authority in reviewing the Department's decision in an expungement request is limited. 33 V.S.A. § 4916c(e) provides that *"the sole issue before the board shall be whether the commissioner abused his or her discretion in denial of the petitioner for expungement. The hearing shall be on the record below, and determinations of credibility of witnesses made by the commissioner shall be given deference by the board."*

Inasmuch as the petitioners have admittedly failed to provide the Department with any verification of their

daughter's alleged recantation, it cannot be concluded that the commissioner has abused his discretion in denying the petitioners' request to expunge the report in question from its registry.

ORDER

For the above reasons the Department's decisions substantiating the reports in question and refusing to expunge them from its registry is affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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